Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

JOHN DOE, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JAMES AND MARY DOE,

Petitioners,

v.

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS; CHARLES EMBRY, Superintendent,

Respondents.

Petition For A Writ Of Certiorari
Rule 33.2.(6)

BRIEF FOR PETITIONERS

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February, 1994

58 pp

QUESTIONS PRESENTED

1. Where the federal IDEA requires each state to meet its own special education standards, and where Tenn. Code Ann. section 49 10-101(a)(1) explicitly requires each school district to provide special education to maximize the capabilities of handicapped children, did the Sixth Circuit err in refusing to accept that mandate as Tennessee's federal standard, even though this was a direct departure from holdings by the First and Third Circuit in analogous cases?

2. Did the Sixth Circuit Court of Appeals substantially depart from the accepted and usual course of judicial proceedings, by ignoring a requirement of a Tennessee statute in a manner the Tennessee Supreme Court within its supervisory jurisdiction has forbidden. If so, did this constitute such a departure as to call for an exercise of the Supreme Court's power of supervision?

3. Where the General Assembly explicitly enacts "a carefully tailored" scheme to "require school districts to . . .provide services sufficient to maximize the capabilities of handicapped children," (Tenn. Code Ann. section 49-10-101(a)(1)) and where Congress subsequently sought both to establish a federal standard and to preserve higher state standards as the alternative federal standard, did the Court of Appeals err by using its own notions of desirable policy to eliminate Tennessee's maximization of services requirement?

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CHARLES EMBRY, Superintendent,

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit below (Appendix A, infra, p. 1a) is reported at 9 F.3d 455 (6th Cir. 1993). The order and decision of the United States District Court for the Eastern District of Tennessee (Appendix C, infra, p. 26a) is unreported. The order and decision of the Tennessee Department of Education (Appendix E, infra, p. 49a) is reported in 17 EHLR 213.

Jurisdiction

The judgment of the Court of Appeals below (Appendix A, infra, p. 1a) was entered on November 5, 1993. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1). 28 U.S.C. section 2403(a) and section 2403(b) may be applicable and copies have been served persuant to Supreme Court Rule 29. There is no certification persuant to 28 U.S.C. section 2403.

Statutory and Regulatory Provisions Involved

Relevant sections of the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et.seq. (West 1990 & Supp. 1993), and Tenn. Code Ann. section 49-10-101(a)(1) (1990), are set forth in the Appendix to the Petition for Writ of Certiorari. (Appendix F & G, infra, pp. 72a-152a.)

Statement of the Case

1. The Statutory Scheme: This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400-1485. ("IDEA"or "Act"), formerly titled the Education of the Handicapped Act. Appendix F at p. 72a. IDEA imposes a number of conditions on states in return for federal funds to aid in educating children with disabilities. The essential condition is that states provide a "free appropriate public education" ("FAPE"). 20 U.S.C. section 1412(6). Appendix F at p. 72a. Pursuant to the Act, a FAPE consists of schooling that is

provided at public expense, under public supervision and direction, in conformity with an "individualized education program" ("IEP")[1], and, significantly, one that *meets the standards of the state educational agency. See* 20 U.S.C. section 1401(a)(18). Appendix F at p. 72a. By this catchall provision, federal law incorporates any state standards that go beyond the minimum standards of the Act, and thereby confers on the federal courts authority to enforce such standards under their "federal question" jurisdiction. 28 U.S.C. section 1331; *Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 575 (3d Cir. 1985).

In Tennessee, public schools serving handicapped students also must conform to certain

[1] The centerpoint of the Act's procedural requirements is the IEP, which "results in individualized consideration of and instruction for each child." *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982). This customized educational program must be prepared at a meeting between a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child (M-Team). Appendix F at p. 72a. 20 U.S.C. §1401 (a)(20).

standards set forth by the Tennessee General Assembly and the Tennessee Department of Education regulations[2]. These standards include those enunciated by the Tennessee General Assembly in Tenn. Code Annot. section 49-10-101(a)(1) (1990) (Appendix G at p. 152a), which provides:

> Legislative intent -- Application of parts 1-6 (a)(1). It is the policy of this state to provide, and to require school districts to provide, as an integral part of free public education, special education services sufficient to meet the needs and *maximize the capabilities of handicapped* children.(emphasis added)

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[2] In Addition, states seeking to receive federal funding under the Act must submit a State Plan to the Secretary of Education. 20 U.S.C. 1413. Appendix F at p. 72a. The Plan must include several assurances concerning *inter alia*, proper expenditure of federal funds, personnel development and certification, and steps to be taken to assure a FAPE to all children with disabilities. 20 U.S.C. 1412(2), 1413. Prior to release of federal funds, the Secretary of Education must approve a state's Plan. *Id.* at §1413(c). Tennessee operates under an approved Plan.

In contrast, IDEA, passed in 1975, sets a more minimal standard than Tennessee's special education statute. IDEA requires that a school district only provide handicapped children with a "free appropriate education." See 20 U.S.C. section 1401 *et seq.*

2. *The Facts regarding the child.* Prior to the fall of 1990, John was a sixteen year old, learning disabled student in the Respondents' School System. Adm. Tr., I, 98-100; Tr.46[3]. Throughout his years there, John experienced academic difficulty culminating in a suicide gesture in the fall of 1989. Adm.Tr., II, 289-90. Despite a series of subsequent meetings between John's parents and

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[3] References to the transscript of the proceedings in the United States District Court on April 29, 1992 will be denoted by Tr., followed by page number. References to the record of the due process hearing before the state of Tennessee will be denoted by Adm.Tr. (Administrative Transcript) or Adm.R. (Administrative Record), as appropriate by volume and page number. References to the technical record will be denoted by an R. A list of pertinant items of the technical record is found at Appendix N, p. 309a.

school officials concerning John's problems, school officials took no action to address these problems. Adm. Tr., I, 116-117, 121-122; II, 320-324.

In the summer of 1990, John's parents became concerned Respondents would not implement a timely or appropriate IEP. Adm. Tr.,II, 326. Therefore, John's parents reserved a place for John in Brehm School. Adm. Tr.,II, 326. Brehm School is a special school for learning disabled children in Carbondale, Illinois. Adm. Tr., II, 326. However, notwithstanding their reservations, John's parents continued the IEP process. Adm. R., Exhibit 21, 2-3. After an August 7, 1990, M-Team meeting produced no IEP for John, John's parents sought

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[4] On August 21, appellants filed in the United states District Court for the Eastern district of Tennessee a complaint and a motion for preliminary injunction. The complaint alleged, *inter alia*, that appellants had failed to make a proper assessment of John, that had failed to develop an IEP for John, and that, as a result, the parents had been forced to enroll John in the rehm Preliminary Injunction sought "a preliminary injunction requiring defendants to fund John's placement at the Breham School until a due process hearing officer can render an opinion on the appropriateness of this program. . ."

help from federal court[4] to compel Respondent to provide a program for John. Adm. R., Exhibit 21, 17- 44, 47-48; R. 1.

A federal court order entered on September 6, 1990, required Respondents to devise an IEP. R. 15. At this court-ordered September 5, 1990 meeting, Respondents created an IEP recommending that John stay in the Respondents school system. Adm. R., Exhibit 32. However, John's parents and all of John's experts and treating professionals found the IEP inappropriate. Adm. R., Exhibit 36, p. 88-89; Adm. Tr.,I, 14-34, 56, 114- 115, 123-124, 153-63, 174-192, Adm. Tr., Vol II, 201-03, 258-62.

3. *Judicial Proceedings*: Petitioners brought this action pursuant to IDEA. 20 U.S.C. section 1415. The Petitioners alleged at the administrative, district, and appellate court levels that IDEA, by incorporation of state standards, requires the Respondents to provide John[5] a free,

appropriate education which *maximizes* his capabilities as provided by Tenn. Code Ann. section 49-10-101(a)(1). Throughout the proceedings below, Petitioners maintained that an (IEP) prepared by Respondents for John did not satisfy the maximization standards of the Tennessee statute. Petitioners therefore sought reimbursement for expenditures they made in placing John in a special school which clearly would maximize his learning capabilities.

At a due process hearing conducted during September and early October, 1990, the administrative law judge for the Tennessee Department of Education ruled section 49-10-101(a)(1), merely a preamble and without force and effect. Appendix E at p. 49a. Therefore, Petitioners appealed the administrative decision to the United States District Court for the Eastern District of

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[5] The parties agree at all pertinent times John was a minor and a handicapped person within the meaning of IDEA.

Tennessee pursuant to 20 U.S.C. section 1415 and 42 U.S.C. section 1988. In a Memorandum Opinion and Order entered on May 29, 1992, the district court affirmed the decision of the administrative law judge. R. 42-43. Appendix C at p. 26a. The court concluded that section 49-10-101 did not require the school system to develop an IEP which maximized John's capabilities. Therefore, the court held that John's parents were not entitled to reimbursement for the sums they expended in sending John to the Brehm School.

On appeal, the Court of Appeals for the Sixth Circuit affirmed the district court's finding that the school district had done all it was required to do under the law. Appendix A at p. 1a. Turning to the question of maximization, the Sixth Circuit found section 49-10-101(a)(1) void for lack of legislative intent because it predated the Federal Act by three years. It is the propriety of this ruling which Petitioners place before this Court.

ARGUMENT

1. *By Declaring Tenn. Code. Annot. 49-10-101(1)(a) Void Because It Predates the IDEA, The Sixth Circuit Rendered a Decision in Conflict With Its Own Precedent and the Decisions of the First and Third Circuits.*

a. *The Sixth Circuit, in the present case, initially agreed with the First and Third Circuit rulings on the issue of state standards, but nonetheless, ruled to the contrary.* The Sixth Circuit stated in the present case: "[i]n this, and other circuits, it is settled that 'even if a school district complies with federal law, it may still violate the [federal] Act if it fails to satisfy more extensive state protections that may also be in place.' 9 F.3d at 457, *citing Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 620 (6th Cir. 1990); *accord David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 417 (1st Cir. 1985) (It is "beyond cavil

that the federal [IDEA] standard explicitly incorporates some of a state's substantive law") *cert. denied* 475 U.S. 1140 (1986); *Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 581 (3d Cir. 1985) ("[W]e find that the incorporation of state standards is explicit in the Act."); 20 U.S.C. section 1401(18)(B). As the Ninth Circuit illustrated: "[e]ven though IDEA does not specifically provide for textbooks, writing materials or appropriately trained teachers, it incorporates the state standards that provides those items." *See Students of Cal. School for the Blind v. Honig*, 736

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[6] Section 1701 of the Massachusetts General Laws ststes *inter alia*:

> The state board shall:
>
> (a)Develop, establish, and continually evaluate and modify in cooperation with intermediate state boards, a state plan for special education which shall provide for the delivery of special education programs and services designed to *develop the maximum potential of every handicapped person.* Appendix H at p. 166a.

F.2d 538 (9th Cir. 1984).

b. *Taking a non-intrusive view of state standards, the First and Third Circuit, unlike the Sixth Circuit, declared antecedence irrelevant to the question of validity of higher state standards under IDEA.* The Massachusetts[6], New Jersey[7], and Michigan[8] statutes, which are the objects of the above cases, contain essentially the same language as the Tennessee statute. Moreover, like Tennessee, their legislatures passed statutes incorporating "maximization" standards prior to

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[7] N.J. Stat. Ann. §18A:46-19.1 (repealed in 1984) stated *inter alia*:

> The legislature hereby finds and determines that the security and welfare of the State require that all school-aged children be assured the *fullest possible opportunity* to develops their intellectual capacities.

[8] Michigan's Mandatoruy Special Education Act provides that the State Board of Education, the intermediate school boards, and local school districts "shall provide special education programs and services *designed to develop the maximum potential of each handicapped person.* M.C.L.A. §§ 380.1711 (emphasis added). Appendix I at p. 178a

the federal act. Although a careful reading of these cases reveals the timing of these statutes, the Sixth Circuit in acknowledging them in the present case, appears unaware timing is not a distinguishable factor between these statutes and Tennessee's statute.

In *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, (1st Cir. 1985) and *Town of Burlington, et al., v. Dept. of Education*, 736 F.2d 773 (1st Cir. 1984), unlike the Sixth Circuit in the present case, the First Circuit contrived no distinction between the force of state standards passed before the federal Act or after. To the contrary, in *Burlington* at 789, note 17, it specifically noted Massachusetts' forefront status in this area: "Massachusetts has a highly developed special education law which predated the federal Act and has served as a model for other state statutes." With these words, the First Circuit took a non-intrusive view of the Act: "We do not believe the Act envisions federal courts

releasing school systems from their state mandated responsibilities and allowing them to comply only with the federal minimums as the Town argues." *Burlington*, 736 F.2d at 792, note 24.

The First Circuit observed the same caution in tinkering with Congress' comprehensive scheme as did this Court in *Smith v. Robinson*, 468 U.S. 992 (1984)("The EHA [now IDEA] is a comprehensive scheme to aid the States in complying with their constitutional obligations [and] . . . allowing a plaintiff to circumvent the EHA's administrative remedies would be inconsistent with that scheme.") The federal judiciary should accord the same cautious respect to the pronouncements of the Tennessee General Assembly as this Court afforded the pronouncements of Congress.

The Third Circuit does not depart from this Court's and the First Circuit's non-intrusive view of the interplay between IDEA and antecedent state statutes. It found that the federal district court has

jurisdiction to enforce a state-mandated standard of educational opportunity against a state agency because the state standard is explicitly incorporated by federal law. Thus, in *Geis, supra* the Court found a *1970* provision of the New Jersey Administrative Code (codified by the new Jersey legislature in *1975*) requires states to provide handicapped pupils a special education program and related services "according to how the pupil can *best achieve* success in learning . . . ." N.J.Admin. Code tit. 6, section 6:28-2.1 (emphasis added) 774 F.2d at 582, note 3. Public School Education Act of 1975, L. 1975, c. 212, as cited in *Levine v. Institution & Agencies Dept. of N.J.*, 418 A.2d 229 (1980).

Similar to *Geis*, in *Barwacz v. Michigan Dept. of Educ.*, 674 F.Supp. 1296 (W.D. Mich. 1987), a case distinguished by the Sixth Circuit in *Doe*, 9 F.3d at 458, note 2, the district court found an antecedent state standard to be the federal standard.

Inaccurately, the Sixth Circuit inaccurately distinguished the facts in *Barwacz* from the present case. *Doe*, 9 F.3d at 458. Specifically, *Barwacz* addressed the relationship between the timing of higher state standards and validity of those standards in depth. The *Barwacz* court not only found Michigan's 1972 special education statute created a higher standard than the federal minimum, it specifically ruled that statutes requiring a higher standard are not voided by subsequent passage of the federal Act. Most importantly, the *Barwacz* court rejected the Defendant's (and the Sixth Circuit's) contention: If the Michigan legislature did not use the federal requirements as a guide, it could not be said that

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[9] The *Barwacz* Court stated:

The court is not persuaded that this is so. Although the Michigan Supreme Court has not addressed this issue, there is some indication based on the relatively few Michigan Court of Appeals decisions which have interprted the Act itself, as well *as the plain language of the Act itself* that Michigan requires something more than the basic federal minimum. 674F.Supp. 1296 at 1304.

Michigan intended to impose a more strict standard.[9] Thus, the *Barwacz* court similarly demonstrates the philosophy of judicial restraint which is the hallmark of the First and Third Circuit's decisions, *supra*, that the Sixth Circuit asserts it embraces.

2. *Although the Foregoing First and Third Circuit Decisions Represent a Philosophy of Federal Restraint From Interference in the Primacy of the State's Role in Education, the Sixth Circuit Rejected This Philosophy.*

a. *The Sixth Circuit's declaration that antecedent state statutes are void usurps the state's historical primacy in education and fundamentally violates the federal-state balance so carefully struck in the Act.* Justice O'Connor has remarked that "[p]rinciples of federalism inherent in our constitutional system and the principle of grantee autonomy apply with special force when federal grant recipients are state or local

governments. *Dixson v. United States*, 465 U.S. 482, 509 (1984)(O'Connor, J., dissenting). Given Congress' intent behind IDEA, this is particularly true where the grant is in the area of special education.

In what this Court termed a "clear statutory directive," Congress, in the IDEA, left "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs . . . to state and local educational agencies in cooperation with the parents or guardian of the child." *Board of Education v. Rowley*, 458 U.S. 176 at 207 (1982). Congress, in passing the Act, "was aware of the states' traditional role in the formulation and execution of educational policy." *Rowley*, 458 U.S. at 207 n.30. In fact, Congress took pains in enacting the Act not to "displace the primacy of states in the field of education" but rather "to assist

them in extending their educational systems to the handicapped." *Rowley* at 208.

The First Circuit utilized this restrained view of federalism in examining Massachusetts' state standard. Refusing to examine the Massachusetts' legislature's intent and its ability to understand its own laws, the First Circuit examined which of the state's powers Congress intended to conserve, declaring: "We find no support in the legislative history of a congressional intention to supplant the states' historic direction of education within their boundaries." *Burlington, supra* at 785.

Building upon Congress' acknowledgement of the historical primacy of state standards and its emphatic intent that the federal government preserve this constancy through cooperative federalism, the *Burlington* court quoted from the legislative history of the Act: "Senator Stafford explained the Conference Committee bill to the Senate: 'Make no mistake, educating our children

is still very much a State responsibility, and this bill does not change that . . .,'" 121 Cong. Rec. 37411 (Nov. 19, 1975). *Burlington, supra* at 785, note 10. The *Burlington* court buttresses its opinion with a description of the delicate cooperative federalism inherent in the Act:

> The Act does not presume to impose nationally a uniform approach to the education of children with any given disability; it requires only that a "free appropriate . . . education," 20 U.S.C. section 1412(1), in conformity with the state's educational standards, 20 U.S.C. section 1401(a)(18), 20 U.S.C. section 1412(6), be provided to each disabled child

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[10] This Court stated in Rowley at 207-208, 102 S.Ct. at 3047-43:

> "Cooperative federalism" in this context, then, allows some substantive differentiation amon the states in the determination of which educational theories, practices, and approaches will be utilized for educating disabled children with a given impairment.

upon individualized evaluation and planning. *See* 20 U.S.C. section 1401(18)-(19) and Rowley 458 U.S.) *supra* at 200-04, 102 S.Ct. at 3047-50.

736 F.2d at 784.

b. *The Sixth Circuit's decision upsets the balance struck between the states and federal government of cooperative federalism and threatens to impose a nationally uniform approach to education by imposing a temporal condition upon state standards.* Congress chose cooperative federalism to conserve not only the historic role of the states, but higher standards developed by states exercising that role. As the First Circuit stated in *Burlington*:

> This asymmetrical approach is based upon the principles and policy of federalism which ground the Act, and more specifically, on the pivotal role of the state historically and as expressly recognized in the Act in setting

and enforcing the educational standards for its citizens. The local education agencies are subject to the state's legal authority, both as a general matter and per the operation of the federal Act. *See* 20 U.S.C. section 1431(a)(2); *see also* 20 U.S.C. section 1412(6). 736 F.2d at 792.

> The achievement of the federal Act's goal free appropriate public education for disabled children will occur primarily via state efforts. We believe this approach properly locates the federal interest at stake *and limits federal intrusion into the relations between states and their political subdivisions.* 736 F.2d at 792.

There is no greater intrusion in these relations than a federal court declaring a state statute void or lawless for a lack of legislative intent. This codifies a view Congress rejected, and threatens not

just the cooperative federalism approach of IDEA, but the wide spectrum of cases utilizing the cooperative federalism approach. *See Burlington* note 8 at 785 (recognizing that Congressional authorization for state law to supply the interstitial detail of federal statues and regulations is not novel. *Citing* 28 U.S.C. Section 1346(b)[Federal Tort Claims Act specifically makes situs state law applicable to determine the government's liability.] *see, e.g., Davis Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); *Seaboard Air Line Ry. Co. v. Kenney*, 240 U.S. 489, 493-94 (1916)). Yet, in the face of Congress' stress upon cooperative federalism, the Sixth Circuit, in *Doe*, concluded that it could follow the clear language of the Tennessee General Assembly, only if it finds that the General Assembly can foretell the future:

> Unless we can attribute prescience to the Tennessee General Assembly, it is impossible to infer an intent to expand the federal

> scheme simply from the enactment of this statute when the language in question predates the federal scheme. But even if the legislature is not composed of seers capable of divining federal legislation-to be, it is possible that the legislature and courts indicated after the passage of the IDEA, that Tenn. Code Ann. 49-10-101(1)(a) was to be interpreted to impose a higher standard than the federal Act.

9 F.3d at 457-58.

Contrary to the Sixth Circuit's clearly stated view, there is no rule under the Constitution that burdens courts with the obligation to find that the Tennessee General Assembly is a fortune teller before it accepts the legislative statements at face value. This view of statutory construction flies in the face of the model set by this Court in *Smith v. Robinson, supra*, wherein this Court refused to make inferences that would disturb the carefully

woven mesh of state and federal law.

Says the First Circuit in *David D.*: "[w]e think, . . ., that Congress understood that the state educational agencies' standards are not *sui generis* or lawless, but must conform to the mandate of state statues as interpreted by *state* courts." 775 F.2d at 417, note 2 (emphasis added). Clearly, Congress intended to let alone that which was already there.

In short, the Sixth Circuit's ruling: 1) causes a de facto split of decisions in the Circuits, 2) usurps the role of state legislative branches in our political system, 3) unjustifiably intrudes on, unbalances, restates, and unravels the carefully woven special education statue of Tennessee, 4) threatens the cooperative federalism central to the Act, 5) guts hard-won rights clearly granted and more expansive than those granted by the federal government, and 6) overthrows accepted rules of statutory construction by placing am impermissible

judicial gloss on the Tennessee statute.

It may be that the Tennessee General Assembly will sometime conclude that it "bit off more than it could chew" and will strike the maximizing language from the statute. But if the maximization language is to be stricken, it should be done by the people's representatives, not by the federal court. In the present case, the Sixth Circuit strayed not just from the decisions of the First and Third Circuit, but from its own prior decision. In *Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 515 (6th Cir. 1984), the Sixth Circuit accepted 49-10-101(a)(1) without treating it as an issue, but as a clear statement of the Tennessee General Assembly, protected by established rules of statutory construction.

3. The Sixth Circuit Ignored Basic Rules of Statutory Construction.

a. *It is axiomatic, in the absence of a legislative declaration to the contrary, that there*

should be a presumption that the Tennessee General Assembly intended the statute to be effective in its entirety. Williams v. Standard Oil Co. 278 U.S. 235, (1929) In *Turner v. Harris*, 281 S.W. 2d 661, 665 (Tenn. 1955) Tennessee's Supreme Court declared that generally, nothing which is not within the manifest intention of the Tennessee General Assembly as indicated by the statute itself may be read in to the statute. In this case there is no such demonstration of manifest intent from the Tennessee General Assembly.

b. *Since a state statute is not to be deemed repealed merely by the reenactment of another state statute on the same subject, it certainly should not be deemed repealed merely by the enactment of a subsequent federal statute on that subject. Pasadas v. National City Bank of New York*, 296 U.S. 497 56 S.Ct. 349 (1936); *Walling v. Patton-Tulley Transp. Co.* 134 F.2d 945 (6th Cir. 1943). In the absence of irreconcilable conflict,

there must be a clear expression of legislative intent to repeal the antecedent statute. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1976). Not only did Congress not intend to repeal state statues, *see, supra* at pg. 13; more importantly, there is no plain showing the Tennessee General Assembly intended Congress' Act to render the higher standard of section 49-10-101 void. To the contrary, common sense teaches the General Assembly intended to adopt a higher standard, regardless of later federal action.

c. *The Sixth Circuit's ruling ignores one fundamental reality: Had the Tennessee General Assembly wished to provide only minimal opportunities for handicapped children, the Tennessee General Assembly would not have used the term "maximize" in the first place.*

Legislative history reveals the maximization language of Section 49-10-101 to be more than accidentally chosen words by the Tennessee

General Assembly, unmindful of their importance. The legislative history of 49-10- 101, *et. seq.* shows the Tennessee General Assembly carefully considered its decision to impose a higher standard. As one legislator noted during the floor debate on Public Chapter 839, which was codified as section 49-10-101 *et seq.*, "this act is more comprehensive in its provisions than the legislation that any other state has now." *See* addendum Appendix L (Transcript of House Floor Debate, Public Chapter 839, 4/4/72), p. 5. Another legislator noted that the bill was aimed at developing maximum potential for handicapped children. *Id.*, p. 4.

The legislative history of 49-10-101 and the rules of statutory interpretation demand but one conclusion: it is inconceivable the Tennessee General Assembly was unaware of the full body of 49-10-101 *et. seq.* and its interplay with the federal Act and it is inconceivable the Tennessee General Assembly intended part of 49-10-101 to be void. It cannot be said that the Tennessee General Assembly did not know

when it accepted federal monies for programs funded under IDEA that it would have to meet the standards established by its educational agency. Further, under established rules of statutory construction, it cannot be said the Tennessee General Assembly did not know those standards encompassed the requirement that Tennessee school systems maximize the capabilities of her handicapped students. The Tennessee General Assembly is presumed to know of other statutes and court decisions germane to the subject it considers, *Aetna Life Ins. Co. v. Hooker*, 62 F.2d 805 (6th Cir. 1933); *Equitable Life Assurance Co. of U.S. v. Odle*, 547 S.W.2d 939 (Tenn. 1977), and it has often reconsidered 49-10- 101 *et.seq.* through the years. *See* Appendix M at p. 122a Nonetheless, the General Assembly has refused to do what the Sixth Circuit accomplished *de facto* in the present case -- repeal section 49-10-101(a)(1).

4. T*he Sixth Circuit's decision improperly*

repeals section 49-10-101(a)(1) by implication.

a. *With the stroke of a pen, the Sixth Circuit did what the Tennessee General Assembly for nineteen years, declined to do: it effectively repealed Section 49-10-101(a)(1).* It is the Tennessee General Assembly 's role to perceive and act upon a change in the wishes of Tennessee's citizens. If the Tennessee General Assembly so perceives, they may, at anytime, repeal section 49-10-101(a)(1) and merely track the language of the federal statute. However, in the last 19 years, the Tennessee General Assembly has refrained from doing so, despite cognizance of this section and ample opportunity to change the statue's clear language.

Through the years, the Tennessee General Assembly extended the coverage of the act, deleted coverage of the act and considered changes in the act containing 49-10-101(a)(1). Notably, there are sets of bills virtually identical, introduced every year from 1976 through 1980 even referencing the federal Act. But at

the time of the Sixth Circuit's decision, not one bill ever required reconsideration of the maximizing provision. Thus, the Tennessee General Assembly did not remain oblivious to the federal Act or oblivious to the provisions of 49-10-101(a)(1). For example, in 1978, the drafters specifically gave the Department of Education rule-making authority to implement the policy set out in T.C.A. 49- 2912, the predecessor to section 49-10-101.

b. *By voiding section 49-10-101(a)(1), the Sixth Circuit transformed the right to the higher state standard into an illusory right.* Such a transformation is contrary to the Sixth Circuit's own statutory pronouncements. *N.L.R.B. v. Tennessee Egg Co., 199 F.2d 95* (6th Cir. 1952)(the court will not ascribe to the Tennessee General Assembly an intent to confer an illusory right); *accord, Contreras v. U.S., 213 F.2d 96* (11th Cir. 1954). The Sixth Circuit's contention that the General Assembly would refrain from directing maximizing services had they known that Congress

would not require maximization in order to get federal grants, is without merit. If the General Assembly thought it was good policy to maximize services without federal help, there is no reason to infer that additional federal funds would cause them to abandon that attempt. Certainly a federal grant of money does not justify the federal judiciary's destructive intrusion into the province of the Tennessee General Assembly, eschewing the guideposts left by not just the General Assembly, but the Tennessee Department of Education and its own prior decisions.

At least one Tennessee Department of Education administrative decision since the federal Act's passage acknowledges the higher standard[11]. (Appendix K at

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[11] The only Tennessee decision, state or federal, prior to the present case in which a court had construed the language of §49-10-101 expressly recognized that the Tennessee legislature had mandated a "higher standard," that of maximizing the capabilities of handicapped children, "rather than the lower threshold level required by federal law . . ." *Krichinsky v. Knox County School*, 17 EHLR 725, 727 (E.D. Tenn. 1991) Appendix J at p. 180a. The court concluded that the Department of Education officer hearing the case had "correctly aplied the higher stated standards instead of the lower federal standard urged upon the court by the county school system. *Id.*

p. 196a) In that case, the parties did not place before the administrative judge the question of what programmatic attributes develop a handicapped child's maximum potential. Nonetheless, as it appears with the Sixth Circuit in *Clevenger*, the administrative law judge assumed, without discussion, that by failing to amend its earlier statue, the Tennessee General Assembly intended developing the maximum potential of every handicapped child to be the higher standard. Neither the Tennessee Department of Education administrative law judge nor the Sixth Circuit presumes the General Assembly ignorant of changes in the political climate since its passage of section 49-10-101(a)(1). However, had the General Assembly resided in ignorance of the changes in the political climate, their ignorance would not void that standard.

c. Changes in the political or public forum do not, by themselves, void an act. There is no

question the federal Act heralded a change in the political environment. What the Tennessee General Assembly would have done had it passed this Act after this change is subject to endless speculation, improper for consideration of legislative intent. *Nashville, C. & St. L. Ry. V. Baker*, 71 S.W. 678 at 680 (Tenn. 1934) presented the Tennessee Supreme Court with a situation similar to the present. In *Nashville, C. & St. L. Ry.*, the Defendant argued that post-statute circumstances invalidated a duty imposed by the statute in question. The court dismissed this argument and said:

> The question of whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions, or whether under existing circumstances have become unfair or inequitable, involves matter of legislative policy. . . . Courts cannot go into and consider such questions any more than they could consider

changed mental attitudes to determine the constitutionality or enforceability of a state.

Nashville, C. & St. L. Ry. at 680.

Whether changed economic and federal grant provisions, or existing unfair and inequitable circumstances renders 49-10- 101(a)(1) burdensome or unreasonable involves matters of legislative policy. Federal Courts, like state courts, cannot consider such questions.

Clearly, the Tennessee General Assembly has not allowed this statute to lie in the dusty attic of ignored statutes grounded in bygone eras. But, even if they did, under Tennessee law, obsolescence and oblivion do not repeal a statute and neither should a federal court.

5. *The Sixth Circuit glossed section 49-10-101(a)(1) with its own intent.* As this Court has recognized, "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what

it says there." *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992). That lack of ambiguity in the statute's language instructs that the "judicial inquiry is complete." *Connecticut Nat'l Bank* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The legislative history of section 49-10-101, along with its clear words reveal no traces of ambiguity justifying the Sixth Circuit's substituting its own political views for those of the Tennessee General Assembly. Thus, the Circuit court's strained interpretation of the statute is nothing less than an impermissible judicial "gloss" on the statute. *See Montgomery v. Hoskinds*, 432 S.W.2d 654, 655 (1968) (unambiguous statutes must be construed to mean what they say, and cannot be given another meaning by judicial construction).

The Sixth Circuit offers specious, political grounds to ignore explicit statutory requirements that are critical to the legislative scheme. Tacitly recognizing the cost of carrying out Tennessee General Assembly's

intent, the Sixth Circuit refers to maximization as a "Cadillac" education while claiming that a "Chevy" education would be sufficient. *Doe*, 9 F.3d at 459-460. By enunciating this policy, the Sixth Circuit Court ignores its own mandate set forth in *Clevenger v. Oak Ridge*, supra, that cost is not a consideration when devising programs for individual handicapped students. The Court further ignored the possibility that Tennessee sees not just the child but its fisc as the beneficiary of the higher state standard. Instead of basing its holding on specious automotive metaphors, the General Assembly may have seen maximizing special education as a way of avoiding later lifetime institutionalization. This view is no more speculative than the Sixth Circuit's since it is generally recognized people with disabilities can become taxpayers through education. Further, early intervention in disabilities through education, may reduce reliance on prisons, asylums, welfare

schemes and other long-term institutional care. Thus, the General Assembly may view the cost of maximizing services as minimizing future costs for other more costly state services.

In short, when the Sixth Circuit restricts its policy analysis to a "Chevrolet/Cadillac" dichotomy, it overlooks several other alternative policies that may have driven the General Assembly's maximization mandate.

Admittedly, the Respondents raised an interesting point before the Sixth Circuit when they asked the Court to strike down statutes passed by the Tennessee General Assembly prior to the encompassing federal Act. The maximization requirement will force Tennessee to provide a higher quality of education and, perhaps initially, expend more funds increasing its capabilities and purchasing outside services. This may or may not be imprudent and wasteful. It may or may not relieve demands on the overall fisc. But that is for the General Assembly to decide, not the federal

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judiciary.

Felix Frankfurther is reported to have said: "anyone who considers it proper for judges to turn so readily to their own notions of desirable policy as a guide to the meaning of a statute must lack the most rudimentary understanding of what separation of powers is all about; that such a view . . . is mischievousness, arrogance, irresponsibility, or all three." Isenburg, *Reminiscences of FF as a Friend*, 51 VA. L. REV. 564, 565 (1965). In 1987, this Court stated this point more formally when it decreed no occasion exists to examine additional considerations of policy that may have influenced lawmakers in formulation of a statute, if the language or provision is sufficiently clear in its context and not at odds with legislative history. *Rodriguez v. U.S.*, 480 U.S. 522 (1987). The Tennessee Supreme Court similarly stated,"[t]he courts cannot attempt to control legislative policy, nor can they inquire into the expediency, propriety,

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or even the justice of a statute which violates no provision of the Constitution." *Nashville, C. & St. L. Ry. V. Baker*, 71 S.W. 678 at 680 (Tenn. 1934). Why, therefore, should the Sixth Circuit Court do what the Tennessee Supreme Court refuses to do?

6. This Application For Certiorari Presents Questions Of Far-Reaching Public Importance.

a. *The Sixth Circuit's interpretation calls into question all state standards different from the Act.* If Respondents receive judicial sanction for refusing to follow the maximization language of the Tennessee statute, other local educational authorities and states surely will follow suit in an effort to save costs. The ultimate result will be near chaos in the law.

Tennessee departs from the federal Act in more than one way in defining special education services. For example, in 1972, Tennessee defined special education services to include services to the gifted, talented and emotionally maladjusted in addition to the maximization requirements. Since the passage of

the federal act, the General Assembly deleted some of these services, such as services to the socially maladjusted. However, the General Assembly retained the gifted and talented provisions up to today. T.C.A. 49-10-102(1)(a)

The Sixth Circuit's ruling will justify Tennessee school systems refusing to provide services or protections to gifted students under the federal Act. It will surely be but a matter of time before a Tennessee school system, relying upon the present case, will do just this. Unfortunately, this conflict in IDEA's brand of cooperative federalism will not dissolve when more Courts of Appeals have had an opportunity to deal with the same question.

b. *The Sixth Circuit's ruling will also contravene the freedom of states to adopt higher standards than those subsequently provided in federal law covering a range of subjects.* No longer may states expect federal courts to enforce antecedent statutes. *Perrin v. United States*, 444 U.S. 37 *(See, i.e.)* ("We hold that Congress intended

'bribery . . . in violation of the laws of the State in which committed' as used in the Travel Act to encompass conduct in violation of state commercial bribery statutes encompassed by not all states.) Clearly, this conflict will continue into the future in a substantial way.

Conclusion

Adoption of the Sixth Circuit's strained interpretation of section 49-10-101(a)(1) would thwart the Tennessee General Assembly 's clearly expressed intent that Tennessee have higher standards for the proper education of Tennessee's handicapped school children than the threshold standard mandated by federal law. The Sixth Circuit committed clear legal error in voiding the higher standard mandated by state law, and imposing upon Tennessee a standard clearly rejected by the Tennessee legislature, viz., the minimal standard mandated by federal law.

In the present case a grant of certiorari is important for three reasons. First, the Sixth Circuit's

decision is in direct and clear conflict with the First and Third Circuit's decisions. Second, a proper development of IDEA, indeed, all cooperative federalism statutes, requires that the questions posed by this case be answered. Otherwise the law itself will suffer if this question remains undecided. Finally, the Sixth Circuit's statutory interpretation is strained and completely at odds with the statue's plain language. Therefore, Petitioners respectfully request this Court grant their Petition.

Respectfully Submitted,

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